etc. as were found therein. The respondents then served further notices on the appellant requiring him to comply with the terms of the order. In this connection they sent him a list of documents, books etc. which they alleged were still in the unlawful and wrongful possession of the appellant and/or his servants and/or his agents.

On the appellant failing to respond to these notices, on March 3, 1975 the respondent company moved the court for leave to issue a writ of attachment against the appellant for contempt of court in disobeying the orders made by the court. Numerous affidavits were filed in connection with this motion by both parties. As the appellant had himself taken out a notice of motion on June 3, 1975 for the interim injunction and the mandatory order of October 4, 1974 to be discharged, further affidavits were filed on the filing of this notice of motion. The two motions being connected with each other were heard together.

It was contended on behalf of the appellant before the learned judge that the bailiff had in fact handed over possession of the bungalow and the office to the respondents, and that none of the other items which he was required to deliver were in his possession as he had not removed anything either from the bungalow or from the office. Having considered all the affidavits which were filed, the learned judge came to the conclusion that he was satisfied beyond all reasonable doubt that the listed items were and are still in the appellant's possession and that for reasons best known to him he had wilfully failed and refused to hand them over to the respondent. He therefore found him guilty of contempt. In the event the appellant's application was dismissed, and there was issued against him a warrant of committal which was to lie in court for a month.

The appellant appealed to this court against that order of committal.

It was common ground that the order which was alleged to have been disobeyed by the appellant related to the account books etc. for the period July 1972 to June 1974. The numerous affidavits filed on behalf of the respondents tended to show that these books of account should have been in the possession of the appellant, although there were no positive statements by any of the deponents of those affidavits that the account books in question had been seen with the defendant at about the time that his services as manager were terminated. There was also no evidence in any of the affidavits that the appellant had been seen to remove any of the books of account. The appellant himself had categorically stated in his affidavits that those account books were not in his possession.

At the hearing of the motions before the learned judge the case of *In re Bramblevale Ltd.*[1] was referred to. It was decided in that case by the Court of Appeal in England that where a person is charged with contempt of court, which is an offence of a criminal nature involving the liberty of a subject, his guilt must be proved beyond reasonable doubt. The learned judge, however, took the view that the facts in that case were quite different from the facts in this case, because the appellant in this case had not said that the required items had been destroyed accidently or otherwise. He further took the view that the appellant's mere denial that the account books were not with him and his conduct subsequent to the making of the order showed that he had no intention at all to voluntarily comply with the terms of the said order.

The conduct of the appellant to which the learned judge made reference obviously related to his non-cooperation with the bailiff in the handing over of the bungalow and the office and the items specified in the order. It was contended before us by counsel for the respondents that the appellant was notified of the time when the bailiff would be there and was asked to be present but he chose not to comply with such request. It was further contended that the appellant gave different stories at different times as regards the whereabouts of the books of account, and it was lastly submitted that in view of the affidavits before the learned judge and some other documents, which incidentally were not before us, there were compelling circumstances from which the learned judge could correctly draw the inference that the appellant was in possession of the books of account in question.

Having heard arguments from both sides the view which we took was that the learned judge had decided the whole case solely on the affidavits. It is clear that there were affidavits on both sides, so that on a mere consideration of such affidavits it was quite impossible to say that the guilt of the appellant had been proved with such strictness of proof as is consistent with the test of "beyond reasonable doubt". The order which the appellant was alleged to have failed to comply with was an interim order. The action is yet to be tried for the final orders to be made. In all the circumstances of the case we felt that the appellant's imprisonment for contempt of court could not be sustained. We therefore allowed the appeal and set aside the order of the court below.

Appeal allowed.

Solicitors: *Mah, Kok & Taye; Salt & Co.*

MOHAMED BIN HUSSIN & ANOR. v. HASHIM BIN SAID

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F.J.J.) September 7 and November 2, 1977]

[Kuala Lumpur — F.C. Civil Appeal No. 58 of 1977]

Practice and Procedure — Costs — Costs awarded to unsuccessful plaintiff — Discretion — Action of Government as defendant unreasonable — Government Proceedings Ordinance, 1956, ss. 14 and 31 — R.S.C., 1957 O. 65 r. 1.

Armed Forces — Member of — Instance of death or serious injury — Administrative measure — Government Proceedings Ordinance, 1956, s. 14(1)(a) & (b).

Government Proceedings — Member of armed forces — Government Proceedings Ordinance, 1956, s. 14.

The respondent who was a member of the armed forces, met with an accident while travelling in a vehicle driven by Mohamed bin Hussin, also a member of the armed forces. The vehicle collided with a lorry coming from the opposite direction. The respondent sued for damages against Mohamed

bin Hussin, his employer the Government of Malaysia and the driver of the lorry. Under section 14 of the Government Proceedings Ordinance, 1956 a member of the armed forces loses his right to sue the Government if (a) he is on duty as a member of the forces or if not on duty he is on vehicle used at the relevant time for the purposes of the forces and (b) the Minister of Finance certifies that he has been or will be compensated for his injuries under service regulations. In this case the accident took place on August 22, 1973, the writ was issued on May 16, 1975 and the defence was delivered on June 10, 1975. The certificate of the Minister of Defence that the respondent was a member of the armed forces was signed on November 4, 1975 and that of the Minister of Finance that compensation would be paid to him on November 20, 1975. Both were served on the respondent on December 20, 1976, that is thirteen months later. The action brought by the respondent was withdrawn and the learned judge awarded costs in his favour against Mohamed bin Hussin and the Government of Malaysia, the appellants. On appeal to the Federal Court,

Held, dismissing the appeal: the action of the Government in this case was unreasonable and fully justified the exercise of the judge's discretion in favour of the respondent.

Per Wan Suleiman F.J.: "... in any instance where death or serious injury... occurs to a force member in circumstances contemplated in section 14(1)(a) of the Government Proceedings Ordinance 1956, his superior should as a standard administrative measure inform his personal representative or the force member, as the case may be, without delay whether the Minister would certify the accident as coming under section 14(1)(b) of the Ordinance."

Cases referred to:-

(1) *Ritter* v. *Godfrey* [1919] 2 K.B. 47.

(2) *Donald Campbell & Co.* v. *Pollack* [1927] A.C. 732.

FEDERAL COURT.

Stanley Isaacs (Federal Counsel) for the appellants.

Chan Shick Chin for the respondents.

Chang Min Tat F.J.: The appeal is by Mohamad bin Hussin and the Government of Malaysia from the order of costs awarded against them when the action against them was withdrawn.

The respondent, the plaintiff in the case, met with an accident while travelling in a vehicle driven by Mohamad bin Hussin. The vehicle collided with a lorry coming from the opposite direction. The lorry driver was made a co-defendant.

The complication in this case arose from the fact that both Mohamad bin Hussin and the respondent were members of the armed forces, and not merely Government servants. If a Government servant, the injured person has to obtain the consent of his departmental head under General Orders, Chap. D Regulation 26(a) to sue. But different considerations arise if he is a member of the forces, by which is meant, in the common understanding of all, the armed forces. If so, then section 14 Government Proceedings Ordinance No. 58 of 1956 applies:

"14. (1) Nothing done or omitted to be done by a member of the forces while on duty as such shall subject either him or the Government to liability in tort for causing the death of another person, or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the forces if —

(a) at the time when that thing is suffered by that other person, he is either on duty as a member of the forces or is, though not on duty as such, on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the forces; and

(b) the Minister of Finance certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under any written law relating to the disablement or death of members of the force of which he is a member:

Provided that this sub-section shall not exempt a member of the said forces from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his duties as a member of those forces."

Any question whether the particular claimant is or is not a member of the armed forces will be determined with finality by the Minister charged with the responsibility for Defence and Internal Security: section 14(3). A certificate from him is conclusive of the fact.

On a reasonable and proper interpretation of section 14(1), it seems to me that the right of a member of the armed forces to sue the Government in tort is taken away when two conditions are together satisfied. He must first under section 14(1)(a) either be on duty as a member of the forces or if not on duty be on a vehicle used at the relevant time for the purposes of the forces. Secondly, under section 14(1)(b), the Minister of Finance must certify that he has been or will be compensated for his injuries under service regulations. If he is not on duty or is in a vehicle not used for the purposes of the forces, his right to sue the Government remains. Alternatively, under section 14(1)(b), if the Minister of Finance chooses to refuse his certificate, then though section 14(1)(a) may be satisfied, his right still subsists. Conceivably, there may be good reasons and circumstances why the Minister of Finance may refuse his certificate, even though the person is a member of the armed forces and is under service regulations liable to be paid for his injuries. For instance, if the accident can be clearly attributable to the entire fault of the other driver and the injured person would be able to obtain a much greater award than he would get by service compensation. It is only when both conditions are satisfied, that his right is removed.

On this construction, I am therefore of the view that until the Minister of Finance decides to pay the injured member of the armed forces service compensation, the latter has the right to sue the Government, under the general provisions of section 5 of the Government Proceedings Ordinance. Federal Counsel who argued the appeal for the Government, conceded quite frankly that section 14 was not operative without the certificate of the Minister of Finance, but his further contention that the respondent should have anticipated this certificate is, with respect, untenable, for the simple reason that it is not mandatory on the Minister's part but only discretionary to issue the certificate.

The dates relevant to the appeal are as follows: The accident occurred on August 22, 1973, the writ was issued out on May 16, 1975 and the defence was delivered on June 10, 1975. The certificate of the Minister for Defence was signed on November 4, 1975 and that of the Minister of Finance on November 20, 1975. Both were served on the respondent on December 20, 1976, i.e. thirteen months later. There would appear to be no previous intimation to the respondent.

Prior to taking out the writ, the solicitors for the respondent had written to the Attorney-General for permission to sue in accordance with General Order Chapter D.26(a). Whether the solicitors were at that time aware of the provisions of section 14 Govern-

ment Proceedings Ordinance or whether they were presuming on a proper and reasonable construction of the section that until the certificate was issued, their clients had a cause of action maintainable in court, are besides the point. It might perhaps have been wiser if a direct enquiry was made whether the Minister of Finance was prepared to treat this case as a service matter and the injuries sustained by the respondent as properly to be compensated under service regulations. But the reply made on behalf of the Attorney-General similarly made no reference to this section 14 and merely referred the solicitors to the Ministry of Defence. To a letter from the solicitors, the Ministry of Defence vouchsafed no reply. It would perhaps make for more certainty if the reply from the Attorney-General had intimated reliance on section 14 or the Ministry of Defence replied advising such a course. It would, at the least, abort any action that was being threatened. It would also indicate to the respondent who was injured, through no fault of his own and only through being present in a military vehicle when it collided with a private lorry, that he would receive compensation for his injuries without going to court. But Federal Counsel seriously contended that Government was not obliged to act or to move to get the relevant certificates until the writ was issued. Whether Government desires to act in any way or at all is a matter strictly for its decision, but if its failure to indicate, as in this particular case, to the injured member of the armed forces its decision to compensate him, compels or forces him to resort to court action, particularly when time is fast running out, then the question must be whether he ought to be paid his costs for an action subsequently aborted by Government.

Insofar as costs are concerned, they can be awarded against the Government: section 31 Government Proceedings Ordinance 1956. Costs in the High Court are in the discretion of the court or judge: Order 65 rule 1, Rules of the Supreme Court. And it is generally accepted that the judicial discretion of the court or judge must be exercised, as it has been said, on fixed principles, that is, according to rules of reason and justice, not according to private opinion. But it is also generally accepted that unless the judge erred on principles in the exercise of his discretion, his decision is not to be disturbed or substituted by the opinion of this court.

The learned judge took the view that —

'Until the certificate was issued plaintiff has a good common law cause of action against first and second defendants and as the 2 letters had been sent before he instituted the action and there was no indication either from the Attorney-General's Chambers or the Ministry of Defence that such a certificate would be issued I considered it reasonable and proper that he be awarded the costs which he would not have incurred had the certificate been issued within a reasonable time after the two letters had been sent. The last letter was sent more than a month before the action was instituted."

The learned judge's view of a good common law cause of action was clearly induced by the submission of learned counsel for the respondent. Federal Counsel submitted it was an error of law. Counsel for the respondent at the hearing before this court frankly conceded his mistake and contended that the proper view was that the respondent had a good cause of action. In my view, he had a cause of action until and unless the Government decides to act under section. 14 Government Proceedings Ordinance.

Federal Counsel resisted the order for costs on a submission substantially that the court's decision to award costs against the Government was based on the ground of the failure to "repudiate liability in pre-trial correspondence," and that such a ground was a wrongful exercise of its discretion. With respect, it is not, in my view, a question of repudiating liability. It is a question of taking a decision on the right of the innocent victim of the bad driving of either the military driver or the lorry driver or possibly of both of them, to compensation, whether to compensate him under the service scheme of compensation or to allow him to proceed in tort. Overhanging this decision is always the question of limitation. No one will contend against Federal Counsel's arguments that the Ministers of Finance and Defence are very busy personages, but for myself, I do not see how it can be suggested that both cannot come to a decision which by its nature is a very simple one to make, within a reasonable time. The Minister of Defence has merely to certify the status of the respondent. His certificate is clearly evidential of a fact. But the certificate of the Minister of Finance is, with every respect to Federal Counsel, not evidential. It is a decision and a statement of an intention and until it is issued, the respondent will not know whether he is to rely on service compensation or he is to go to a court of law. And, I repeat, I do not see that it is a matter of difficulty to make this decision. For this reason, I reject the alternative argument that the respondent should have anticipated the certificate.

If Government is to act only when the writ is issued, then it is very obvious that in this view, it has compelled the other side to resort to action which it has the power to render unnecessary by a decision that can without difficulty be and perhaps should be taken much earlier. But according to Federal Counsel, it is the view or practice of Government that the relevant certificate will not be issued until action has been commenced, even though in this view a member of the armed forces will certainly have to incur costs, before he knows. Perhaps consideration should be given whether it is correct. It appears to me that the contention of Federal Counsel carries in itself the argument for its own destruction.

It must be borne in mind that the respondent sustained his serious injuries in August 1973. If he had to resort to action in 1975, it must mean only one thing: that Government had until action was started, not only failed to pay him any compensation but also failed to arrive at any decision to do so, or to advise him of any likelihood of his being paid.

With respect, I agree therefore with the learned judge that the action of the Government is unreasonable. It was in my view "conduct which induced the plaintiff to bring the action, and without which it would probably not have been brought" within the meaning of conduct justifying depriving a successful defendant of his costs, as defined by Lord Sterndale M.R. in *Ritter* v. *Godfrey*[1] and approved by Lord Atkinson in his speech in *Donald Campbell & Co.* v. *Pollack*[2] at page 815. It was conducted which fully

justified the exercise of the judge's discretion in favour of the respondent.

There was no cross-appeal by the respondent that he should have been paid his costs up to the service of the certificates and not up to the date of the issue of the certificates. It was arguable, but counsel for the respondent was quite satisfied with the order made and I say no more about it.

I would dismiss the appeal with costs.

Lee Hun Hoe C.J. (Borneo) concurred.

Wan Suleiman F.J. (read by Chang Min Tat F.J.): I have read the judgment of my learned brother Datuk Chang with interest, and agree that on the grounds set out so lucidly by his Lordship this appeal should be dismissed with costs.

It may seem hard that in circumstances such as the present one the successful party should have to pay costs, but it is infinitely harder for a member of the armed forces who has been seriously injured, subject as he is to rigid rules of discipline to wait helplessly not knowing whether he would get service compensation whilst time for obtaining redress from the courts of law is running out.

If as learned Federal Counsel had stated, the present practice is to wait until a writ is filed by the injured member of the force before any move is made to seek a certificate from the Minister of Finance, then no complaint that the trial judge had not used his discretion judicially in making an order of the present sort is likely to find favour with this court. I would make so bold as to suggest that in any instance where death or serious injury (trifling injuries may be ignored) occurs to a force member in circumstances contemplated in section 14(1)(a) of the Government Proceedings Ordinance, 1956, his superiors should as a standard administrative measure inform his personal representative or the force member, as the case may be, without delay whether the Minister would certify the accident as coming under section 14(1)(b) of that Ordinance.

Appeal dismissed.

Solicitors: *Murphy & Dunbar.*

COLLECTOR OF LAND REVENUE, JOHOR BAHRU v. SOUTH MALAYSIA INDUSTRIES BHD.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.)
July 16 and 17, August 25 and January 5, 1978]

[Johore Bahru — Federal Court Civil Appeal No. 75 of 1976]

Land Law — Forfeiture — Special conditions imposed on alienation of land — Land to be solely used for erection of a factory — Portion of land rented out to urea company for use as a store — Whether this constitutes breach of condition — National Land Code, ss. 117, 128, 129 and 257.

This was an appeal from the decision of Syed Othman J. ([1976] 2 M.L.J. 271). The respondents had been granted a 60 year lease over 3 acres of State land with special conditions, the main one being that it was to be used solely for the erection of a factory. Another condition prohibiting the transfer, charge or sublease of the land had been lifted after the factory was built. Two other express conditions were referred to in the qualified title. The first related to the payment of premium and deposit and the second was in regard to the restriction of user to light industry. The respondents rented out a portion of the factory to an urea company for 3 years for use as a store. The Collector alleged that since the conditions specify that the land should be used for the erection of a factory it was a breach of the conditions to use a portion of it for a store. He applied for forfeiture of the land unless the respondents remedied the breach by June 30, 1976. The respondent applied for a declaration that the Collector's action was bad in law. The learned trial judge granted the application for the declaration and gave three reasons for his decision. First he said there must be an express condition if it is contemplated to prohibit a different user (to use part of factory premises as a store or office); secondly, to use part of factory premises as a store for its own goods and commodities is not inconsistent with section 117(1)(a)(iv) of the National Land Code; and thirdly there must be a prohibition, either express or implied, against sub-leasing. The Collector appealed to the Federal Court.

Held, allowing the appeal: (1) the State Authority had and did exercise its power to impose restrictions as to the user of the factory erected on the land in question. The learned trial judge was wrong when he said that there can only be a breach if there is a special condition, express or implied, prohibiting the use;

(2) the express conditions imposed an imperative obligation on the respondent to use the factory premises for light industry and that being the inherent limitation as to user, storing of industrial chemicals and fertilisers was not a legitimate purpose of user permitted under the lease;

(3) the use of part of the factory premises in this case for an alien and totally unconnected industrial project was inconsistent with the express conditions in the lease;

(4) the Collector could not be said to have acted unreasonably in this case and the respondent company could not claim to be released in equity against the appellant's legal rights.

[**Editorial Note:** See Supplementary Judgment at p. 134.]

Cases referred to:-

(1) *Hyman* v. *Rose* [1912] A.C. 623, 631.
(2) *Kemp* v. *Bird* (1877) 5 Ch. D. 974.
(3) *Bashir* v. *Commissioner of Lands* [1960] 1 All E.R. 117.
(4) *Brigg* v. *Thornton* [1904] 1 Ch. D. 386.
(5) *Esdaile & Ors.* v. *Lewis* [1956] 2 All E.R. 357.
(6) *Lam Kee Ying Sdn. Bhd.* v. *Lam Shes, Tong & Anor.* [1974] 2 M.L.J. 83.
(7) *Winter Garden Theatre (London) Ltd.* v. *Millenivon Productions Ltd.* [1947] 2 All E.R. 331, 343.

FEDERAL COURT.

Suleiman bin Hashim (Senior Federal Counsel) for the appellant.

Chua Jui Leng for the respondent.

Raja Azlan Shah F.J. (delivering the judgment of the Court): This case concerns alienation ot a piece of State Land dated May 13, 1971, and made by the State Authority whereby an industrial lot in Jalan Skudai, Johor Bahru, measuring about 3 acres was granted by the State Authority to the respondent company for a term of 60 years, subject to the provisions and conditions contained in the National Land Code and to a number of specified conditions referred to in the Qualified Title as, and therein set out under the heading of "Special Conditions" (section 109). The said conditions comprised six numbered paragraphs of which the first three are in these terms:

"i. The land hereby leased shall be used solely for the erection of a factory.